IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE NO. 1167 OF 2000

IN

SUIT NO. 1448 OF 1984

Ashfaqbhai Abdullabhai .. Plaintiff.
vs.
Mohammedhussain Abdullabhai
Fidaali & Ors. .. Defendants.

Mr. Paul P.P. i/by M/s. Nanu Mormasjee & Co.
for defendant nos. 2 & 4.
Mr. Birendra Saraf for defendants 10 to 15.
Mr. Subodh Joshi i/by Nandlal Kothari & Sabir
for defendant no.1.

CORAM : S.C. DHARMADHIKARI, J.

DATE : 12th June, 2006.

P.C.

. This is a notice under Order 21 Rule 22 of the Code of Civil Procedure which is by defendant no. 1 in Suit No. 1448 of 1984.

2. The notice calls upon the defendant nos. 10 to 15 to the suit to show cause why a consent decree passed against them on 3.12.1991 in the above suit should not be executed.

3. The suit was filed by the plaintiff, who has expired, for a declaration that the gold bonds described in Exhibit ’B’ formed part of the estate

of the deceased Abdullabhai Fidaalli and that the plaintiff and defendants have share in the said gold bonds as per the statement Exhibit ’C’.

4. It is claimed that the gold in lieu of these bonds be realised and recovered from the authorities by appointing Court Receiver and thereafter the gold be distributed by dividing the same by metes and bounds.

5. Alternatively the suit claims that if the division by metes and bounds is not possible, the gold be realised and sold and thereafter proceeds be distributed in accordance with shares.

6. In prayer clauses (e) and (f) to the plaint, this is what is prayed :-

"(e) In the alternative to prayers (b) and (c) above, Defendants Nos. 10 to 15, be ordered and decreed to make available gold received by them in lieu of the said Gold Bonds for the purpose of distribution, and thereafter, decree in terms prayed for in prayers (b) and (c) above be passed;

(f) In the alternative to prayers (b), (c) and (e) above, Defendants Nos. 10 to 15 be

ordered and decreed to make good the loss to the estate caused by them in the sum of Rs. 2,35,000/- being the value of shares of the Plaintiff in the said gold bonds and be ordered and decreed to pay to the estate the said amount and upon such payment being made, the amount be ordered to be distributed to the Plaintiff;"

7. The consent terms in pursuance of which the decree was passed record that the plaintiff as well as defendant nos. 1 to 5, 7 and 8 declare that they do not have any share, right, title or interest of any nature whatsoever in movable and immovable properties the details of which are set out in the decree. They also declare that Plaintiff and Defendant Nos. 1 to 5, 7 and 8 have no share in the business of the Partnership firms, details of which are disclosed in the Terms. However, the decree passed by consent records that out of the gold 11715 gms, more particularly described in Schedule 'B', 5/6th share therein shall belong to the Defendants Nos. 10 to 15 and 1/6th share therein shall belong to the plaintiff and the Defendants Nos. 1 to 5, 7 and 8 i.e. 1952.50 gms. It is further agreed that these parties will get 2000 gms of bold bonds in which each of them shall have equal share.

8. Thereafter, the consent decree records an undertaking of the defendant no. 12 to implement the consent terms by handing over gold bonds of 2000 gms to the plaintiff and defendant nos. 1 to 5, 7 and 8 in the manner set out in the consent terms.

9. The case of the 1st defendant, who has moved this execution application, is that pursuant to this agreement based upon which a decree by consent was passed by this Court, the gold bonds have not been handed over to him and, therefore, the decree be executed in accordance with law.

10. Since the decree was passed in the year 1991 and the execution application is filed two years after the date of the decree, the present notice under Order 21 Rule 22 has been taken out and placed before me for orders.

11. Mr. Saraf, appearing for the defendant nos. 10 to 15, invited my attention to the decree and contended that the 1st defendant has taken out this notice under Order 21 Rule 22 of the Code of Civil Procedure, 1908. In his submission, the purpose of issuing a notice under Order 21 Rule 22 is to grant an opportunity to the judgment debtor to show cause why a decree passed against him

should not be executed and enforced. The purpose of issuance of such show cause notice is to call upon him to satisfy the Court that the decree, in his opinion, is not executable. If such is the object and purpose of issuance of a show cause notice, then, according to Mr. Saraf, it is open for the 1st defendant to point out at this stage itself that the decree is not executable.

12. He submits that this is a decree by consent which demarcates and sets out shares of the parties to the suit in the assets and the properties of the deceased and in the present case the gold bonds. They have to be delivered by defendant nos. 10 to 15 to the plaintiff and defendant nos. 1 to 5, 7 and 8. The present application is only by the 1st defendant. The decree is a joint decree. The application does not say that the 1st defendant has moved it for the benefit of the other decree holders. There is nothing on record to indicate that other decree holders/beneficiaries have moved any application. Therefore, the execution application is not maintainable. Consequently, the notice is liable to be discharged.

13. Alternatively, it is contended by him that the consent terms were taken on record and consent decree passed. There were certain disputes between the advocate of the decree holders and the decree

holders inter-se. Proceedings were instituted before the Bar Council of Maharashtra and Goa against the Advocate. The Advocate during the course of said proceedings has addressed letter dated 13.9.1999 pointing out to the defendant no. 1 that the gold bonds were handed over by the defendant nos. 10 to 15 and they are with him and as far as the share of defendant no. 1 is concerned, the same was handed over to him. In these circumstances, the decree has been fully satisfied and it is for the plaintiff, defendant nos. 1 to 5, 7 and 8 to resolve whatever controversy and dispute inter se. If such is the state of affairs, the application to execute the decree by the 1st defendant alone is not maintainable.

14. Reliance is placed upon a decision of the Patna High Court in the case of Noor Zaman Khan v. Mt. Maimunnissa Bibi and others, reported in AIR 1958 PATNA 228 and the decision of the Honourable Supreme Court in the case of Jagdish Dutt and Another vs. Dharam Pal and Others, reported in (1999) 3 SCC 644.

15. Mr. Joshi, appearing for the 1st defendant, invites my attention to the affidavit in rejoinder and states that it is false that he as well as the other defendants were treated as one

group. They are not a group and that the defendant no. 1 is not part of any group. He has denied that defendant nos. 10 to 15 were discharged after making payment of specific amount and gold bonds to Advocate Mr. D.S. Chopra. He has denied that any agreement was entered into. Inviting my attention to paragraphs 4, 5 and 7 of the affidavit in rejoinder Mr. Joshi submits that the true facts are that the advocate Mr. Chopra was calling upon the 1st defendant to take 500 gms of gold bonds and pay over to him Rs. 71,430.29. The gold bonds were in the name of Zakir Hussein and the 1st defendant could not have encashed them. The offer of the advocate has been rejected. He submits that the 1st defendant can claim the share both in the amount and the gold bonds as per the consent decree and, therefore, the application is maintainable. The judgments cited are rendered in the peculiar facts brought before the Patna High Court and the Honourable Supreme Court.

16. At this stage, it is not necessary to record any findings with regard to the decree having been marked satisfied. It would be open for the defendant nos. 10 to 15 to raise all such contentions as are permissible in law in that behalf. They are also at liberty to take out appropriate proceedings to get the decree marked satisfied as well. In my view, considering that

the defendant nos. 10 to 15 have agreed under the consent terms passed in favour of the plaintiff and defendant nos. 1 to 5, 7 and 8 to pay to the plaintiff and defendant nos. 1 to 5, 7 and 8 gold bonds as also the sum of Rs. 85,714.49 and Rs. 14,285.71, it is open for the 1st defendant to apply to this Court by taking out execution proceedings and pray that the consent decree be executed and defendant nos. 10 to 15 be directed to comply with their obligations and undertakings.

17. Order 21 Rule 15 of the Code of Civil Procedure which has been pressed into service reads thus :-

> 15. Application for execution by joint decree-holders--(1) Where a decree has been passed jointly in favour of more persons than one, any one or more of such persons, may, unless the decree imposes any condition to the contrary, apply for the execution of the whole decree for the benefit of them all, or, where any of them has died, for the benefit of the survivors and the legal representatives of the deceased.
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> (2) Where the Court sees sufficient cause for allowing the decree to be executed on an application made under this rule, it shall make such order as it deems necessary for protecting the interest of the persons who have not joined in the application.

A bare reading of Order 21 Rule 15 (1) would make it abundantly clear that where a joint decree has been passed in favour of more persons than one, it

is open for any or more of such persons to apply for the execution of the whole decree for the benefit of them all or where any of them has died for the benefits of all the survivors and the legal representatives unless the decree imposes any condition to the contrary. Mr. Saraf has not been able to point out anything from the decree much less a condition imposed therein to disentitle the 1st defendant from applying for execution of the decree as far as his share in the Gold Bond and Cash Amount. Sub-rule (1) incorporates a mandate enabling any one or more of the persons in whose favour decree has been passed to apply for the execution of the whole decree. It is upon such application being made that it is further open for the Court not only to allow the decree to be executed as far as the Applicant but it can also protect the interest of the persons who have not joined in the application as such. At this stage, it is not necessary for me to conclusively determine as to whether the 1st defendant having applied for execution of the decree by taking out an execution application the benefit thereunder should be granted to all or such of them who have not joined the same. The benefits can be restricted or it can be extended depending upon the satisfaction of the Court. Today an application under Order 21 Rule 11 has been filed. Since the application is made more than two years after the

date of the decree the notice under Order 21 Rule 22 has been taken out. It is not for me to give any finding, much less conclusive as to whether the decree has been satisfied or that the defendant no. 1 cannot have any benefit of the decree solely for himself. All contentions can be raised by the defendant nos. 10 to 15 in this behalf in their application for marking the decree satisfied or when further steps in Execution are taken. At this stage, it is not possible to hold that the Decree is not executable or enforceable. More so, considering the clauses in the Consent Decree. Similarly, the Decree grants benefit to Defendant No. 1, he can apply for execution qua him. Whether he would succeed in this endeavour is a distinct aspect. At the threshold, it cannot be held that the Decree is not executable.

18. Reliance placed upon the letter of the advocate, copy of which has been annexed to the affidavit in reply is misconceived at this stage, because, in the rejoinder filed the 1st defendant has denied that the decree has been satisfied or that he has received the benefit thereunder.

19. In the affidavit in reply it is pointed out that the parties to the suit were divided into groups. However, this fact is also denied in the affidavit in rejoinder. I have heard the oral

submissions of Mr. Saraf based upon provisions of Order 21 Rule 15 and the decisions of the Honourable Supreme Court and Patna High Court brought to my notice. In the affidavit in reply, the objections, which are orally raised before me have not been specifically set out.

20. That apart, before the Patna High Court the facts were that a money decree was obtained by the decree holder against respondent nos. 3 to 5. The decree was being executed. She thereafter made a gift of her properties including the decree in favour of her two daughters who are respondent nos. 1 and 2. Thereafter, she made a further gift of her properties including 8 annas share of the decree to her son who was the appellant before the Patna High Court. The execution application was dismissed on part satisfaction and respondent nos. 1 and 2 certified payment under the decree to the extent of their interest. On 18.2.1951 the gift in favour of the appellant before the Patna High Court was cancelled. The donor died on 11.7.1951. On 29.8.1952 the appellant filed a petition for execution of the remaining 8 annas of the decree on the basis of the gift deed. He did not implead respondent nos. 1 and 2 who were parties in earlier execution case. The judgment debtor filed an objection under Section 47 on the ground, inter alia, that the execution was not maintainable

because respondent nos. 1 and 2 had not been made parties.

21. It is in these circumstances that the Patna High court observed that the contention raised that it was not necessary to implead them is without any merit. The same was turned down in the light of the phraseology of Order 21 Rule 15. The Patna High Court rejected the appellant's submission because it recorded a finding that the appellant did not proceed under Order 21 Rule 15 as he claimed to be the only person interested in the remaining decree on the ground that it was gifted to him by his mother.

22. Therefore, unless it is demonstrated that the applicant before me (defendant no. 1) is proceeding under Order 21 Rule 15 or while so proceeding he has not satisfied the requirements therein, this judgment will have no application.

23. The judgment of the Supreme Court relied upon pertains to a decree for possession passed in favour of a Hindu joint family. The judgment debtor was already in possession having purchased undivided, undetermined interest of one of the joint decree holders. The joint decree holders, according to the Supreme Court, can seek execution of the whole and not part of the property. A

decree holder even if entitled to seek execution of the whole cannot dispossess the judgment debtor till the rights of the parties are appropriately ascertained in a decree in a partition suit. Upholding such pleas the Honourable Supreme Court observed that the decree for ejectment which has been passed cannot be executed unless and until the shares of the decree holders are defined or those shares can be predicted or they are not in dispute. The executing Court cannot find out the shares of the decree holders and dispute between joint decree-holders is foreign to the provisions of Section 47 CPC.

24. Thus, everything depends upon the nature of the decree under execution. Whether it is capable of being executed jointly and wholly or partially is decided considering this aspect. On that depends the applicability of Order 21 Rule 15 as well. In the present case, it is not for me at this stage to decide as to whether the application for execution preferred by the 1st Defendant projects a dispute which is there between the plaintiff and defendant nos. 1 to 5, 7 and 8 or it is really calling upon the executing Court to determine their shares inter se. For the present, from the material produced, it is not possible to conclude that the execution application really calls upon this Court to ascertain the shares. The

1st defendant is seeking execution of the consent decree because of the failure of defendant nos. 10 to 15 to pay the amount and hand over the gold to him. It will be for defendant nos. 10 to 15 to point out that considering the nature of the consent decree the handing over of the gold and the amount, if at all, to one of them, was enough and that satisfies the entire decretal claim.

25. The notice under Order 21 Rule 22 therefore, will have to be made absolute. It is accordingly made absolute. No order as to costs.

26. Mr. Joshi, appearing for the 1st defendant decree holder states that for a period of 4 weeks from today, the 1st defendant shall not take any steps to execute and enforce the decree.